Supreme Court, U.S.
FILED
APR 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1561

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ORGANIZED FISHERMEN OF FLORIDA; HERBERT Z. MARVIN; VICTOR H. MARKLEY; and CLYDE R. RAFFIELD, Petitioners,

v.

DONALD P. HODEL, Secretary of the United States Department of the Interior; WILLIAM P. MOTT, Director of the National Park Service; BOB BAKER, Regional Director of the Southeast Regional Office of the National Park Service; JOHN MOREHEAD, Superintendent of Everglades National Park; UNITED STATES DEPARTMENT OF THE INTERIOR; THE NATIONAL PARK SERVICE; EVERGLADES NATIONAL PARK, EVERGLADES PROTECTION ASSOCIATION, INC.; WORLD WIDE SPORTSMEN, INC., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

Parker D. Thomson
Counsel of Record
THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
4900 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2363
(305) 350-7200

Of Counsel:
Cloyce L. Mangas, Jr.
Douglas M. Halsey
Attorneys for Petitioners

TABLE OF CONTENTS

Table of Authorities..... ii

Introduction..... 1

INTERVENING MATTERS AND NEW CASES... 2

I. POST-MANDATE DEVELOPMENTS. 2

II. THE COX CASE: THE 11TH CIRCUIT'S NEW ESTOPPEL DECISION..... 5

III. TREATMENT OF STATE LAW ISSUES IN GOVERNMENTAL ESTOPPEL CASES..... 15

SUPPLEMENTAL APPENDICES

Supp. App. A: Order of the United States Court of Appeals for the Eleventh Circuit, filed March 26, 1986 ..... 1a

Supp. App. B: Opinion of the United States Court of Appeals for the Eleventh Circuit, dated April 1, 1986, in Cox v. Kurt's Marine Diesel of Tampa, Inc., ___ F.2d ___, West slip op. 2686 (No. 85-3768)... 2a

TABLE OF AUTHORITIES

Cases: Page

Block v. Payne, cert. granted, ____ U.S. ____, 106 S.Ct. 57, 88 L.Ed.2d 46 (1985) (No. 84-1948), oral argument docketed, 54 U.S.L.W. 3607, argued sub nom. Lyng v. Payne, 54 U.S.L.W. 3675 & 3677 (U.S. Mar. 24, 1986) (No. 84-1948) ..... 3, passim

Christmann & Welborn v. Department of Energy, 773 F.2d 317 (Temp. Emer. Ct. App. 1985) cert. denied, ____ U.S. ____, 54 U.S.L.W. 3252 (1985) (No. 85-81) 15

Cortese v. United States, 782 F.2d 845 (9th Cir. 1986), petition for reh'g filed by U.S. (9th Cir. Mar. 27, 1986) (Nos. 84-5841, 84-5846) (pending) 16

Cox v. Kurt's Marine Diesel of Tampa, Inc., ____ F.2d ____, West slip op. 2686 (11th Cir. Apr. 1, 1986) (No. 85-3768) ... 4, passim

Deltona Corp. v. Alexander, 682 F.2d 888 (11th Cir. 1982) 9

Federal Deposit Insurance Corporation v. Harrison, 735 F.2d 408 (11th Cir. 1984), reh'g denied en banc, 768 F.2d 1353 (11th Cir. 1985) 7, 8, 12

Furcron v. United States, 626 F.Supp. 320 (D. Md. 1986) 14

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) ..... 7, passim

Hodel v. Tosco Corporation, Nos. 85-1068, 85-1097, 86-1092, 85-2205, 86-1082, 86-1083, 86-1090, 86-1097 (10th Cir. first appeal filed Aug. 9, 1985) (consolidated appeals pending) 14

Lyng v. Payne, argued, 54 U.S.L.W. 3675 & 3677 (U.S. Mar. 24, 1986) (No. 84-1948) 2, 3, 11

Moody v. United States, 783 F.2d 1244 (5th Cir. 1986), mandate issued (5th Cir. Mar. 25, 1986) 9

Organized Fishermen of Florida v. Hodel, 775 F.2d 1544 (11th Cir. 1985), reh'g denied, ___ F.2d ___ (11th Cir. Dec. 23, 1985), petition for cert. filed, 54 U.S.L.W. 3650 (U.S. Mar. 24, 1986) (No. 85-1561) 8, 9, 10

Payne v. Block, 751 F.2d 1191 (11th Cir. 1985) ("Payne III") (per curiam), cert. granted, ___ U.S. ___, 106 S.Ct. 57, 88 L.Ed 2d 46 (1985), oral argument docketed, 54 U.S.L.W. 3607, argued sub nom. Lyng v. Payne, 54 U.S.L.W. 3675 & 3677 (U.S. Mar. 24, 1986) (No. 84-1948) ..... 3, passim

Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st Cir. 1986), mandate issued (1st Cir. Mar. 24, 1986) 15

Reetz v. Bozanich, 397 U.S. 82 (1970) 16

Simmons v. Block, 782 F.2d 1545 (11th Cir. 1986) 11

Tosco Corporation v. Hodel, 611 F.Supp. 1130 (D. Colo. 1985), consolidated appeals pending (10th Cir.) (Nos. 85-1068, 85-1097, 86-1092, 85-2205, 86-1082, 86-1083, 86-1090, 86-1097) 14

United States v. Tull, 769 F.2d 182 (4th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3518 (U.S. Jan. 24, 1986) (No. 85-1259) 12, 15

United States v. Tull, 769 F.2d 182, 188 (4th Cir. 1985) (Warriner, D.J., sitting by designation dissenting)..... 12, 15

Rule:

S.Ct.R. 22.6 2

Other Authorities:

A. Teitz, Equitable Estoppel Against the Government: What, Never? Well, Hardly Ever!, 9 [ABA] Urban, State and Local Law Newsletter 7 (Wint. 1986) ("Part Two: The Supreme Court View Changes, But Not Much") 13

No. 85-1561

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ORGANIZED FISHERMEN OF FLORIDA; HERBERT Z. MARVIN; VICTOR H. MARKLEY; and CLYDE R. RAFFIELD, Petitioners,

v.

DONALD P. HODEL, Secretary of the United States Department of the Interior; WILLIAM P. MOTT, Director of the National Park Service; BOB BAKER, Regional Director of the Southeast Regional Office of the National Park Service; JOHN MOREHEAD, Superintendent of Everglades National Park; UNITED STATES DEPARTMENT OF THE INTERIOR; THE NATIONAL PARK SERVICE; EVERGLADES NATIONAL PARK, EVERGLADES PROTECTION ASSOCIATION, INC.; WORLD WIDE SPORTSMEN, INC., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

Organized Fishermen of Florida, Herbert Z. Marvin, Victor H. Markley, and Clyde R. Raffield (collectively, "OFF") file this supplemental brief in

relation to their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit (the "11th Circuit"). Pursuant to Supreme Court Rule 22.6, OFF calls attention to the several intervening developments and new cases.

INTERVENING MATTERS AND NEW CASES

I. POST-MANDATE DEVELOPMENTS.

OFF filed the petition on March 24, 1986 and immediately so advised the 11th Circuit where OFF's motion to recall the mandate was pending.[1/] Unbeknownst to OFF, that same day this Court heard oral argument in Lyng v.

1/ By notice of intervening developments directed to the Clerk of the 11th Circuit, served March 24, 1986, filed March 25, 1986.

Payne to review the 11th Circuit's judgment in "Payne III."[2/]

By order filed March 26, 1986 the 11th Circuit denied OFF's motion to recall the mandate (Supp. App. A, infra, 1a. See generally Pet. at 22-23, ¶10).[3/]

Five days later, in another case, the 11th Circuit sharply changed its position from that previously iterated and reiterated, saying, "Estoppel may not be asserted against the United

---

2/ Payne v. Block, 751 F.2d 1191 (11th Cir. 1985) (per curiam) ("Payne III"), cert. granted, _____ U.S. _____, 106 S.Ct. 57, 88 L.Ed. 2d 46 (1985), oral argument docketed, 54 U.S.L.W. 3607, argued sub nom. Lyng v. Payne, 54 U.S.L.W. 3675 & 3677 (U.S. Mar. 24, 1986) (No. 84-1948). OFF's counsel is informed that the Solicitor General maintained at oral argument before this Court on March 24, 1986 that Payne III is an estoppel case plain and simple.

3/ No grounds were given. It is possible the 11th Circuit believed the motion moot once the petition was filed in this Court.

States government when it acts in its sovereign capacity but may be asserted when it acts in a proprietary capacity." Cox v. Kurt's Marine Diesel of Tampa, Inc., _____ F.2d _____, West slip op. 2686, 2687 (11th Cir. Apr. 1, 1986) (emphasis added).[4/]

By letter-order, dated April 18, 1986, the Clerk of this Court (i) granted the Solicitor General's request for an extension of time within which to file a brief in opposition to the petition, and (ii) extended the time to file such brief to May 25, 1986.

4/ Supp. App. B, infra, at 3a-4a. Chief Judge Godbold, writing for the 11th Circuit, summarized the facts of Cox as follows:

> Kurt's Marine Diesel was a plaintiff in an earlier suit in which the U.S. marshal [Cox] took custody of an arrested ship. The marshal erred in estimating the custodial charges by neglecting to include

(footnote continued)

II. THE COX CASE: THE 11TH CIRCUIT'S NEW ESTOPPEL DECISION.

The law in the 11th Circuit on the substantial federal question present-

---

4/ (continued)

> insurance expense of $1,144.26. The error was not caught until after the parties had settled their differences and the defendant in that case agreed to pay the custodial charges as estimated by the marshal. The settlement did not include the charge for insurance.
>
> The marshal brought this suit seeking to recover from Kurt's the insurance expense. Kurt's asserted, inter alia, the defenses of waiver and estoppel and negligent misrepresentation. The district court granted summary judgment for the marshal.

Cox, supra, at 2686-87, reprinted in Supp. App. B, infra, 2a passim (brackets added).

The other two members of the Cox panel were Circuit Judges Hill and Anderson, both of whom were members of the panel in OFF. Judge Anderson authored the decision below (for which certiorari review is sought in OFF's petition) and subsequently entered the order denying OFF's motion to recall the mandate. Chief Judge Godbold was a member of the panel in Payne III, supra. The Cox panel was thus intimately familiar with the 11th Circuit's decisions in OFF and Payne III, supra. But cf. note 7, infra.

ed in OFF's petition (viz, whether estoppel against the government is a viable claim) remains in utter and apparently ever growing chaos. The newest, post-mandate, decision in Cox, supra, further confounds the law. Prior to Cox, the 11th Circuit had disclaimed holding whether estoppel could be asserted against the government when the government engaged in affirmative misconduct.[5/] The language of Cox, however, would appear to foreclose squarely any estoppel claim or defense against the federal government in the 11th Circuit where the government acts in its sovereign capacity, including estoppel based on affirmative

---

5/ See citations to the many decisions so holding at Pet. at 24 n.10.

misconduct.[6] For this proposition (quoted in text, supra, at 3-4), the Cox decision cited one case, Federal Deposit Insurance Corporation v. Harrison, 735 F.2d 408 (11th Cir. 1984), although that decision specifically reserved the "affirmative misconduct" question.[7]

6/ Cox may be distinguishable as not involving any alleged "affirmative misconduct" on the part of the government for it appears, at least from the Cox opinion, that the private party only argued (by way of defense) that the government had acted in its proprietary, as opposed to its sovereign, capacity in that case. The 11th Circuit rejected this contention. By contrast, OFF makes no "proprietary capacity" argument in this case.

7/ The 11th Circuit's opinion in Cox made no reference to the decisions below in OFF or Payne III, supra, or this Court's decision in Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984), cited in Pet. at 27 passim. See generally note 4 supra. OFF believes the Cox decision's unqualified reliance on Harrison, supra, was ill-considered and misplaced because, as OFF has advised this

(footnote continued)

In this case ("OFF"), the 11th Circuit expressly assumed that estoppel against the government is a viable claim. That is contrary to both Cox and the district court in OFF which had held in 1980 and again in 1984 (on the basis of a 1973 Fifth Circuit case) that estoppel may not be asserted against the United States government.[8]

7/ (continued)

Court and the 11th Circuit, Harrison and its progeny, like Heckler and its progeny, expressly reserved the "affirmative misconduct" question. See Harrison, supra, 735 F.2d at 410 (11th Cir. 1984), reh'g denied en banc, 768 F.2d 1353 (1985), cited in Pet. at 24 n. 10. See also note 10 infra.

8/ See Pet. at 15-16 (OFF district court anticipating the Cox holding almost verbatim).

In fact, the Fifth Circuit has explicitly reserved the question, according to both

(footnote continued)

If Cox, rather than OFF or Payne III (which themselves are also inconsistent), is now the law in the 11th Circuit, then the district court in OFF was correct in concluding it lacked subject matter jurisdiction to decide OFF's estoppel and due process claims and the 11th Circuit in OFF was wrong in assuming estoppel is a viable claim against the government. Compare Pet. at 15-16 with Pet. at 18.

8/ (continued)

the 11th Circuit (see Deltona Corp. v. Alexander, 682 F.2d 888, 891 n. 4 (11th Cir. 1982), quoted in Pet. at 25 n. 10) and the Fifth Circuit in a newly reported decision. See, e.g., Moody v. United States, 783 F.2d 1244, 1246 n. 2 (5th Cir. 1986), mandate issued (5th Cir. Mar. 25, 1986) (mandate unreported). Prior to Cox, that was also the rule in the 11th Circuit. See note 5 supra.

Further irony attends the result and rationale in Cox. For Cox also expressly held the defense of negligent misrepresentation against the government "is not barred," Cox at 2687 (emphasis added), even where the government is held to have acted in its sovereign capacity. Id. (Supp. App. B, infra, at 6a.). OFF submits that if a negligent misrepresentation can "bar" the government from taking challenged inconsistent action (semble, Cox; semble, accord, Payne III, supra), then, a fortiori, affirmative misconduct can do so.

The Payne III - OFF - Cox trilogy seems to teach that in the 11th Circuit one can make the traditional equitable showing of an estoppel (see Heckler, supra, 467 U.S. at 61) -- and prevail against the government -- pro-

vided one denominates the claim or defense something other than "estoppel."[9/] (The Solicitor General made identical criticism of the 11th Circuit in this Court, albeit from the opposite perspective, in Lyng v. Payne, supra.) Yet one's right to believe and reasonably rely upon federal officials for estoppel purposes surely cannot or should not turn on how the claim or defense is labeled. If private parties do not have the right to believe and reasonably rely

---

9/ Meanwhile, the 11th Circuit continues to cite Payne III, supra, and its antecedent opinions in that case with approval for the proposition, "The courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself." Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1986). But see OFF (rejecting OFF's APA claim). Apparently, an estoppel claim cloaked in APA clothing (semble, Payne III) prevails in the 11th Circuit where overt and equitable estoppel and due process claims, denominated as such, do not. (semble, OFF).

upon federal officials, then there simply cannot be a case where the government can be estopped.10/

That sustained analytical failure and resulting doctrinal chaos may or may not be solely the fault of

---

10/ That is the ineluctable consequence of Cox, but such a conclusion completely ignores this Court's recognition of the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Heckler, supra, 467 U.S. at 61, quoted with approval in, e.g., Harrison, supra, 735 F.2d at 410 n. 3, quoted in Pet. at 39 n. 19.

Apropos of OFF's dilemma and frustration with the 11th Circuit's instrumentalist approach, one federal judge recently observed of his Fourth Circuit brethren's approach, "Indeed, until I read the holding in this case I would have held it would be unreasonable for [the private party] not to rely on the United States [government officials]. . . . The guardians of the nation's wetlands eschewed diligence for trickery." United States v. Tull, 769 F.2d 182, 191 (4th Cir. 1985) (Warriner, D.J., sitting by designation, dissenting) (emphasis in original and brackets added), petition for cert. filed, 54 U.S.L.W. 3518 (U.S. Jan. 24, 1986). See note 14 infra.

the 11th Circuit.[11/] Some critics imply the ultimate fault lies with this Court and now hyperbolically maintain, "The Court has steadfastly refused to hint what facts would justify estoppel. As with obscenity, the Court will know a true estoppel case when it sees it."[12/] This new criticism is probably overstated, because newly reported decisions which have focused on this Court's

---

11/ OFF believes much of the blame lies with the government's lawyers, who appear to have consistently failed to bring the recent, pro-estoppel cases to the lower courts' and private parties' attention despite the government, by definition, being a named party or the real party in interest in all such estoppel cases. This seeming failure of candor, coupled with the government's seeming predeliction to treat all estoppel claims as frivolous, runs the serious risk of misleading the lower federal courts.

12/ A. Teitz, Equitable Estoppel Against the Government: What, Never? Well, Hardly Ever!, 9 [ABA] Urban, State and Local Law Newsletter 7 (Wint. 1986) ("Part Two: The Supreme Court View Changes, But Not Much") (actually published Apr. 1986).

criteria in Heckler have held that estoppel against the government is a viable claim. E.g., Furcron v. United States, 626 F.Supp. 320, 321-24 (D. Md. 1986) (denying government's motion to dismiss equitable estoppel claim).[13/]

In any event, these newly-reported decisions, as well as other recent contrary decisions and pending and denied petitions for certiorari in cases where estoppel was held not to be a viable claim against the government (or otherwise held not to have been shown), amply demonstrate that the

---

13/ And have held the government is estopped. Tosco Corporation v. Hodel, 611 F.Supp. 1130, 1198-1209 (D. Colo. 1985), cited in Pet. at 30 n. 13 & 39 n. 19. Since the filing of the petition, OFF has learned the Secretary filed a notice of appeal in Tosco on August 9, 1985, which appeal remains pending in the Tenth Circuit. See Hodel v. Tosco Corporation, (Nos. 85-1068, 85-1097, 86-1092, 85-2205, 86-1082, 86-1083, 86-1090, 86-1097) (10th Cir.) (Consolidated appeals).

governmental estoppel issue remains unsettled and should consequently be at last resolved by this Court.[14/]

III. TREATMENT OF STATE LAW ISSUES IN GOVERNMENTAL ESTOPPEL CASES.

Finally, a newly reported case from the Ninth Circuit demonstrates that the 11th Circuit's treatment of the threshold state law issues critical to the federal question estoppel and due process claims in OFF is fundamentally at odds with other circuits' treatment

---

14/ See generally, e.g., Phelps v. Federal Emergency Management Agency, 785 F.2d 13, 16-19 (1st Cir. 1986) (No. 85-1591), mandate issued (1st Cir. Mar. 24, 1986) (mandate unreported); Christmann & Welborn v. Department of Energy, 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, ___ U.S. ___, 54 U.S.L.W. 3252 (1985) (No. 85-81). Compare United States v. Tull, 769 F.2d 182, 187-88 (4th Cir. 1985), petition for cert. filed sub nom. Tull v. United States, 54 U.S.L.W. 3518 (U.S. Jan. 24, 1986) (No. 85-1259) with Tull, 769 F.2d at 188-95 (Warriner, D. J., sitting by designation, dissenting).

and analysis of state law issues in post-Heckler governmental estoppel cases.[15/]

15/ Compare Cortese v. United States, 782 F.2d 845, 848-49 (9th Cir. 1986) (applicability of state law where relevant state law is held to be not hostile to federal law), petition for reh'g filed by U.S. (Mar. 27, 1986) (pending) (Nos. 84-5841, 84-5846) with Reetz v. Bozanich, 397 U.S. 82 (1970) (Pullman abstention where right-to-fish provisions of Alaska Constitution had never been interpreted by an Alaska court), cited in Pet. at 37 n. 18.

In this case, the 11th Circuit circumvented the plain language of the 1929 Florida Right-to-Fish Law by construing it to be consistent with the challenged Rules. See Pet., App. A, 19a-20a, and Pet., App. J, 110a. Under the Ninth Circuit test in Cortese, supra, once the federal court determines the state law is not hostile to federal law, the federal court is bound to apply and follow state law in determining the legal nature of the asserted property interest. In Cortese, the Ninth Circuit held the government was not estopped, but further held non-hostile state law must be applied to define the private parties' property interests.

281-A

/s/ Parker D. Thomson
Parker D. Thomson
Counsel of Record
THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
4900 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2363
(305) 350-7200

Of Counsel:
Cloyce L. Mangas, Jr.
Douglas M. Halsey

Attorneys for Petitioners

April 26, 1986

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5722

ORGANIZED FISHERMEN OF FLORIDA, HERBERT Z. MARVIN, VICTOR H. MARKLEY and CLYDE R. RAFFIELD,

Plaintiffs-Appellants,

v.

DONALD P. HODEL, Sec. U.S. Dept. of Interior, etc., et al.

Defendants-Appellees,

EVERGLADES PROTECTION ASSOCIATION INC., & WORLD WIDE SPORTSMEN, INC.,

Intervenors.

Appeal from the United States District Court for the Southern District of Florida

---

[Filed March 26, 1986]

O R D E R:

(X) The motion of appellants for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

SUPPLEMENTAL APPENDIX B

Richard L. COX, Jr., United States Marshal for the Middle District of Florida, Plaintiff-Appellee,

vs.

KURT'S MARINE DIESEL OF TAMPA, INC., Defendant-Appellant.

No. 85-3768

Non-Argument Calendar

United States Court of Appeals, Eleventh Circuit.

April 1, 1986

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

GODBOLD, Chief Judge:

Kurt's Marine Diesel was a plaintiff in an earlier suit in which the U.S. marshal took custody of an arrested ship. The marshal erred in

estimating the custodial charges by neglecting to include insurance expense of $1,144.26. The error was not caught until after the parties had settled their differences and the defendant in that case agreed to pay the custodial charges as estimated by the marshal. The settlment did not include the charge for insurance.

The marshal brought this suit seeking to recover from Kurt's the insurance expense. Kurt's asserted, inter alia, the defenses of waiver and estoppel and negligent misrepresentation. The district court granted summary judgment for the marshal.

Estoppel may not be asserted against the United States government when it acts in its sovereign capacity but may be asserted when it acts in a

proprietary capacity. FDIC v. Harrison, 735 F.2d 408 (11th Cir. 1984).

> Proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.

Id. at 411.

In taking custody of the ship the marshal was not involved in a proprietary activity but was acting for the benefit of the public at large by assisting the federal judicial system in the resolution of a dispute, a governmental function. Kurt's would characterize the transaction as commercial because it involved the purchase of insurance by

the marshal, but purchasing the insurance was only incidental to the governmental function of taking the vessel into custody. The defense of estoppel is not available.

Kurt's also asserted the defense of negligent misrepresentation. The government argues that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., which precludes claims against the United States arising out of misrepresentation, bars this defense.

> The United States cannot be sued unless it specifically consents to be sued, either by specific statutory consent, . . . or by instituting a suit as to which a defendant may plead matters in recoupment. . . . . To state a claim in recoupment, a counterclaim must assert a claim arising out of the same transaction or occurrence which is the subject matter of the government's suit and seek relief only to the extent of diminishing or defeating the government's recovery.

EEOC v. First National Bank of Jackson, 614 F.2d 1004, 1007-1008 (5th Cir. 1980), cert. denied, 450 U.S. 917, 101 S.Ct. 1361, 67 L.Ed.2d 342 (1981).

The alleged misrepresentation arises out of the same transaction that is the subject matter of the government's suit. The only relief that Kurt's seeks is to defeat the government's claim. Under EEOC v. First National Bank Kurt's misrepresentation defense is not barred.

REVERSED.

185-C